

Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused

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Introduction

Numerous records of trial reveal that judge advocates in the field confuse forfeitures adjudged by a court-martial and forfeitures resulting only by operation of law. Further, they confuse traditional methods of granting clemency (all still available) with deferment and waiver of forfeitures required by operation of law. These misunderstandings lead to ultra vires actions by convening authorities. When appellate courts return these cases to convening authorities due to improper actions, some staff judge advocates (SJAs) may be tempted to advise convening authorities to refrain from granting warranted and appropriate clemency. The distinctions between types of forfeitures and methods of clemency available to convening authorities are set forth below. Congress vested the discretion to grant warranted clemency in convening authorities.¹ However, Congress also required that convening authorities obtain and consider the advice of their SJAs prior to exercising this discretion.²

This article highlights the types of clemency available to convening authorities—"deferments," "waivers," and "disapprovals, commutations, and suspensions." The applicability and limitations of each type of action available, considerations in determining what type of relief the convening authority wishes to grant, when the convening authority may act, what directions if any must be included in the action, and what must be included in the convening authority's action under Rule for Courts-Martial (R.C.M.) 1107(f)(4)(E) will be examined for each.

Types of Clemency

A convening authority has the authority to affect forfeitures adjudged by a court-martial or resulting only by operation of law (and not adjudged by the court-martial) in three ways.

First, the convening authority may defer both (1) forfeitures adjudged by the court-martial, and (2) forfeitures required by operation of law, until the date that action on the sentence is taken.³ Second, the convening authority may waive forfeitures required by operation of law.⁴ Finally, the convening authority may disapprove, commute, or suspend forfeitures adjudged by the court-martial in whole or in part.⁵

Deferments

A deferment leaves money that would otherwise be forfeited, in the hands of the accused. Deferments apply to both adjudged forfeitures and forfeitures required by operation of law.⁶ However, any deferment should specify whether it is meant for adjudged forfeitures, forfeitures required by operation of law, or both. Depending on the adjudged sentence deferment of one type of forfeiture, without the deferment of the other, may have little or no effect.⁷

In 1996, Congress amended Article 57(a) of the Uniform Code of Military Justice (UCMJ) to make forfeitures effective either fourteen days after the sentence is adjudged by a court-martial or when the convening authority takes action in the case, whichever occurs earlier. Until this change, forfeitures did not take effect until the convening authority took action, which meant the accused often retained the privilege of his pay for up to several months. The intent of the amendment to Article 57(a) was to change this situation so that the desired punitive and rehabilitative impact on the accused occurred more quickly. Congress desired, however, that a deserving accused be permitted to request a deferment of any adjudged forfeitures, and that a convening authority might mitigate the effect of Article 57(a).⁸

1. See UCMJ art. 60(c) (West 1998); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(2) (1998) [hereinafter MCM] (convening authorities shall approve the sentence warranted by the circumstances and appropriate for the accused) R.C.M. 1107(b)(1) discussion.

2. See UCMJ art. 60(d); MCM, *supra* note 1, R.C.M. 1106(a), (d)(1), (3)(F).

3. UCMJ arts. 57(a)(2), 58b(a).

4. *Id.* art. 58b(b).

5. *Id.* art. 60(c); MCM, *supra* note 1, R.C.M. 1107(d)(1).

6. Two-thirds of pay in the case of a special court-martial and total pay and allowances at a general court-martial.

7. See *Disapproval* section, *infra*.

Like adjudged forfeitures, forfeitures required by operation of law may be deferred. Any deferment of forfeitures required by operation of law follows the same rules as those for adjudged forfeitures.⁹

Article 57 does not, however, create a permanent statutory authority within the convening authority that allows him to defer forfeitures. The authority to defer forfeitures only accrues to the convening authority upon application by an accused.¹⁰ Therefore, a convening authority may only defer forfeitures if the accused specifically requests. Further, deferral of forfeitures is meant for a deserving accused. Therefore, upon the granting of a deferral, the accused continues to draw the pay that would have otherwise been forfeited. Upon the granting of a deferral request, whether of adjudged forfeitures, forfeitures required by operation of law, or both, the convening authority has no authority to direct that the payment be paid to the dependents.¹¹

Once the convening authority takes action, any deferment is automatically canceled.¹² In all other cases, the deferment continues until it expires by its own terms, or it is rescinded. Unlike waivers, there is no six-month limitation on deferments.

On deferral requests acted on after 27 May 1998, the decision of the convening authority acting on the request shall be subject to judicial review, but only for abuse of discretion.¹³ Therefore, if a deferment request is denied, a written basis should be attached to the record of trial.¹⁴ The granting of a deferment should be reported in the convening authority's action under R.C.M. 1107(f)(4)(E), if it occurred prior to 27 May 1998. If it occurred on or after 27 May 1998, it must be

included.¹⁵ Adjudged forfeitures cannot be deferred and suspended at the same time.¹⁶

Waivers

A waiver leaves money, that would otherwise be forfeited, in the hands of the accused's dependents. Waivers apply only to forfeitures required by operation of law. Adjudged forfeitures cannot be waived; they must be disapproved, commuted or suspended, or deferred prior to action. If forfeitures are adjudged and the other punishment adjudged brings the sentence within the parameters of Article 58b(a)(2) of the UCMJ, a waiver of forfeitures required by law will have no effect on the adjudged forfeitures.¹⁷

Article 58b permits the convening authority to waive any and all forfeitures required by operation of law¹⁸ for a period not to exceed six months. The purpose of such waiver is to provide support to some or all of the accused's dependents¹⁹ when circumstances warrant. The convening authority directs the waiver and identifies those dependents who shall receive the payments. The direction should identify the dependents by name, and state the amount and number of months for which the waiver and payment shall apply.

No request for waiver need be made. Article 58b(b) gives the convening authority, the authority to waive forfeitures required by Article 58b(a) upon motion of the accused, the accused's dependents, any other party, or upon his own initiative.²⁰ However, the convening authority does not have the authority to waive forfeitures unless the accused has dependents. The maximum period of any waiver is six months, and

8. A request for deferment of forfeitures may be granted or denied at any time between adjournment of the court-martial and approval of the sentence by the action of the convening authority. UCMJ arts. 57(a)(2), 58b(a); MCM, *supra* note 1, R.C.M. 1101(c)(2), (6).

9. UCMJ art. 58b(a)(1).

10. *Id.* art. 57.

11. Thus, if the desired result is to provide for an accused's dependents as soon as possible after the sentence is adjudged; in most cases, if the accused requests deferment of forfeitures, the adjudged forfeitures may be deferred and the forfeitures required by operation of law may be waived. *See Waiver* section, *infra*.

12. UCMJ art. 57(a)(2). Thus, if continued support to dependents is desired, at least a portion of the adjudged forfeitures must be disapproved, commuted, or suspended. *See Waiver* section, *infra*.

13. MCM, *supra* note 1, R.C.M. 1101(c)(3).

14. *Id.* discussion.

15. *Id.* R.C.M. 1101(c)(4).

16. *Id.* R.C.M. 1101(c)(6) discussion.

17. *But see supra* notes 11 and 12. Additionally, one panel of the Army Court of Criminal Appeals has stated in dicta that when adjudged forfeitures are approved at action a waiver is generally unavailable because there are no forfeitures required by operation of law to waive. *See United States v. Kolodjay*, __M.J.__, No. ARMY 9700389, 1999 CCA LEXIS 313, at *13 (29 Dec. 1999). (But consider the concept of a springing executive interest.)

18. UCMJ art. 58b(a).

19. *See* 37 U.S.C.A. § 401 (West 2000) (defining dependents).

the convening authority must direct which dependents are to receive the pay. This direction cannot, however, be accomplished until fourteen days after the sentence is adjudged.²¹

All such waivers must be included in the action.²² The directions normally should not be included in the action.²³

Disapprovals, Commutations, and Suspensions

Disapprovals, commutations, and suspensions apply only to the adjudged sentence and have no direct effect on forfeitures required by operation of law. Thus, if a sentence described in Article 58b(a)(2)²⁴ of the UCMJ is adjudged and also includes total forfeitures, disapproval, commutation, or suspension of the forfeitures will have no real effect. If any of these actions are taken, the adjudged forfeitures will not be imposed, but they will simply be replaced by forfeitures required by operation of law.²⁵ If the disapproval or commutation moves the punishment outside the parameters of Article 58b(a)(2), however, forfeitures will no longer be required by operation of law.²⁶ A suspension, however, cannot directly move the sentence outside the parameters of Article 58b(a)(2).²⁷ However, if a suspension becomes a remission, prior to promulgation, the sentence can be moved outside the parameters of Article 58b(a)(2).²⁸

Disapprovals, commutations, suspensions, and remissions must be noted in the action, or in the promulgating order if done after the initial action.²⁹

Recommendations and Conclusions

Convening authorities have broad discretion to grant or deny clemency, and to ensure discipline and justice for the command, the military community, the accused soldier, and that soldier's dependents. The UCMJ and Rules for Courts-Martial provide numerous and diverse mechanisms that allow convening authorities to achieve almost any goal desired. Staff judge advocates have the duty of ensuring that convening authorities are properly and fully advised on all of these methods, and specifically advised as to which method the SJA believes is appropriate in an individual case. It is the responsibility of SJAs to fully advise convening authorities on the just and proper—not the easy—course of action. Likewise, a convening authority should never deny an accused subordinate or a subordinate's dependents warranted clemency support solely out of fear of creating error. The broad discretion to grant clemency a financial relief was placed with the convening authority because Congress believed that these senior military leaders, with their broad experience and advice of experienced SJAs, would insure justice by granting warranted clemency in appropriate circumstances. Staff judge advocates simply need to understand the different methods, purposes, limitations, and procedures for each type of relief. Respect for the military justice system, and thus, good order and discipline, morale, and respect for the military, depends on such understanding and sound advice.

20. UCMJ art. 58b(b).

21. MCM, *supra* note 1, R.C.M. 1101(d)(1).

22. Neither statute nor rule specifically requires that waivers be included in an action. A waiver does, however, change the total amount of forfeitures. Since the United States Court of Appeals for the Armed Forces has ruled that forfeitures required by operation of law are punishment (*United States v. Gorski*, 47 M.J. 370, 373 (1997)), and all punishments changed by the convening authority must be included in his action, *see* R.C.M. 1107(f) waivers.

23. The directions do nothing to change the punishment, and therefore, add nothing to the action. They may, as the beneficiary of the waiver is often a victim, violate important privacy interests or even disclose a victim's location to the accused unnecessarily.

24. Confinement for over six months, a punitive discharge combined with confinement, or death.

25. For example, if the adjudged sentence is ten months confinement, a bad conduct discharge, and total forfeitures, disapproval of adjudged forfeitures, with no other action, will have no real effect because forfeitures by operation of law will remain in effect.

26. Again, with the same adjudged sentence of ten months confinement, a bad conduct discharge and total forfeitures, disapproval of the bad conduct discharge and approval of only four months of the adjudged confinement will bring the sentence outside the parameters that impose forfeitures by operation of law.

27. Thus, in the example in note 26, if the convening authority suspended, rather than disapproved, the punitive discharge and confinement beyond four months, the suspension would have no direct effect, and forfeitures required by operation of law would still occur.

28. Thus, looking to the example in note 27, while the initial action would have no direct effect on the forfeitures required by operation of law, if the period of suspension is successfully completed and becomes a remission (*see* MCM, *supra* note 1, R.C.M. 1108), the sentence is then moved outside the parameters of Article 58b(a)(2). The accused is then due the pay and allowances he would have been paid, but for the forfeitures required by operation of law, for the period which such forfeitures were in effect. UCMJ art. 58b(c).

29. MCM, *supra* note 1, R.C.M. 1107(f), 1114.

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Purpose	To permit a convening authority to mitigate the effect of Article 57(a) UCMJ, upon request of a deserving accused.	To provide support to some or all of the accused's dependents when circumstances warrant.	To approve only that sentence which the convening authority in his sole discretion, after considering all relevant factors (including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency), determines is warranted by the circumstances of the offense and appropriate for the accused.	To change one form of punishment to a less severe punishment of a different nature.	To grant the accused a probationary period during which the suspended part of an approved sentence is not executed.

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Limitations	<p>1. The convening authority has no authority to grant a deferment unless the accused requests the deferment.</p> <p>2. Any grant should specify whether it applies to adjudged forfeitures, forfeitures required by operation of law, or both.</p> <p>3. Cannot be directed to dependents.</p> <p>4. Adjudged forfeitures cannot be deferred and suspended at the same time.</p> <p>5. Can only be granted until action and action automatically cancels any deferment of forfeitures.</p> <p>6. Subject to judicial review and when a request is denied a written basis must be attached to the record of trial.</p>	<p>1. Applies only to forfeitures by operation of law (adjudged forfeitures cannot be waived).</p> <p>2. Must be directed to dependents. (If an accused does not have dependents, forfeitures cannot be waived).</p> <p>4. Cannot be accomplished until fourteen days after the sentence is adjudged.</p> <p>5. Can only be granted for a period of six months.</p>	<p>1. Cannot be accomplished until action.</p> <p>2. Acts as a withholding unless combined with a deferment.</p> <p>3. Cannot directly affect forfeitures required by operation of law.</p> <p>4. No statutory or regulatory means to ensure that the pay is going to the dependents.</p>	<p>1. Cannot be accomplished until action.</p> <p>2. Acts as a withholding unless combined with a deferment.</p> <p>3. Cannot directly affect forfeitures required by operation of law.</p> <p>4. No statutory or regulatory means to ensure that the pay is going to dependents.</p> <p>5. Less severe punishments of forfeitures are usually restricted to restriction, hard labor without confinement and reprimand.</p>	<p>1. Cannot be accomplished until action.</p> <p>2. Acts as withholding unless combined with a deferment.</p> <p>3. Cannot directly affect forfeitures required by operation of law.</p> <p>4. No statutory or regulatory means to ensure that the pay is going to dependents.</p>

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Common Pitfalls	<p>1. Convening authority does not specify which forfeitures (adjudged or those required by operation of law) he intends to defer. Specify one, the other or both.</p> <p>2. Deferments do not live past action, if a convening authority wishes the accused to retain any or of all of his pay after action, traditional clemency must be granted at the time of action.</p> <p>3. Convening authority wants to direct that pay goes to dependents. This cannot be accomplished with a deferment. Deferred forfeitures go to the accused. If forfeitures are adjudged, no pay can be directed to the dependents unless, there are also forfeitures required by operation of law and:</p> <p style="padding-left: 20px;">a. The accused requests deferment of forfeitures, deferment of adjudged forfeitures is granted, and a waiver of forfeitures required by operation of law is granted; or</p> <p style="padding-left: 20px;">b. Action is taken, granting traditional clemency and waiving forfeitures required by operation of law.</p> <p>4. No written basis is given for a denial.</p>	<p>1. Convening authority grants a waiver prior to fourteen days after the sentence.</p> <p>2. Convening authority refers to a request for waiver or the granting of a waiver as a deferment.</p> <p>3. Convening authority attempts to waive adjudged forfeitures.</p> <p>4. Convening authority attempts to grant a waiver when an accused does not have dependents per 37 U.S.C. § 401.</p> <p>5. Convening authority waives forfeitures required by operation of law without taking any action as to adjudged forfeitures.</p> <p>6. Convening authority attempts to waive forfeitures required by operation of law and defer adjudged forfeitures without a request from the accused.</p> <p>7. Convening authority grants a waiver without directions as to which dependents are to receive the pay, amounts, and duration.</p>	<p>1. Convening authority does not disapprove adjudged forfeitures in conjunction with a waiver of forfeitures required by operation of law.</p>	<p>Convening authority does not commute adjudged forfeitures in conjunction with a waiver of forfeitures required by operation of law.</p>	

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
When a convening authority may act	Upon request of the accused.	At any time between fourteen days after the sentence is adjudged until action.	At action.	At action.	At action.
Include in action	Yes.	Yes, but not the directions.	Yes.	Yes.	Yes.